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**MEMORANDUM OF LAW**

**DATE:** March 28, 2001  
**TO:** William T. Griffith, Real Estate Assets Director  
**FROM:** City Attorney  
**SUBJECT:** Proposed Mission Bay Hotel with "Pre-sold" Reservations

**QUESTIONS PRESENTED**

May the City, pursuant to both San Diego Charter section 55 and restrictions on the use of tidelands trust property, lease dedicated parkland in Mission Bay to permit the development of a hotel with pre-sold reservations? What, if any, additional restrictions would be necessary for a hotel with pre-sold reservations to be permissible?

**SHORT ANSWER**

Yes. Consistent with the tidelands trust doctrine, and under Charter section 55, the City may lease dedicated parkland in Mission Bay for development of a hotel with pre-sold reservations provided that such a hotel is determined to be reasonably necessary to accommodate park visitors. In addition, and to ensure that access by the general public to the tidelands and dedicated parkland is maintained, we recommend that an appropriate policy be adopted which requires: (1) the total number of units with pre-sold reservations within Mission Bay Park be limited to ensure sufficient rooms are still available to the general public on a first come, first served basis; (2) any unused units be made available to the general public on a daily rental basis; (3) contracts permitting such uses contain audit provisions permitting the City to audit the use and availability of the rooms consistent with the purported and intended purpose and operation of the hotel; (4) contracts permitting such uses include specific provisions to ensure the occupancy of the units is transient in nature and no property rights are conveyed for individual units; (5) the sale of vacation credits provides that the credits expire with the ground lease, regardless of the date of termination; and (6) pre-sold reservations are limited to one-week increments.

## **BACKGROUND**

We are informed that the City is currently in negotiations with a developer for the redevelopment of dedicated City parkland in Mission Bay with a number of visitor-serving uses. The developer has proposed two hotels on the site, one to include a “vacation club,” outlined in the memorandum attached as Exhibit A. The proposed project is similar to a vacation timeshare project, except that it would not include any ownership of individual units, as is common in typical timeshare projects. Instead, vacationers would purchase vacation credits and then make reservations, just like at any other resort. The vacation credits would give the vacationer a right to a reservation for one week of vacation time each year for a 50-year period. The proposed project would provide for significant use by members of the public and would make unreserved units available to the general public on a daily basis.<sup>1</sup> The proposed project is also on filled tidelands held in trust by the City subject to restrictions imposed by the tidelands trust as overseen by the State Lands Commission.

## **ANALYSIS**

### **I.**

#### **THE PROPOSED USE IS CONSISTENT WITH THE TIDELANDS TRUST.**

In 1996, the State Attorney General issued an opinion approving the lease of filled tidelands for construction of a timeshare resort on the assumption that the timeshare had the following features: (1) a vacation-oriented development with typical one-week occupancy by the timeshare owner; (2) units not timely reserved by the owner could be rented on a nightly basis by the timeshare management company; (3) owners’ rights to occupy units would terminate with the ground lease; and (4) the resort would afford improved access to the shoreline for use by the general public. 79 Op. Cal. Att’y. Gen. 133, 141 (1996). The Attorney General approved the use on tidelands because in considering the duration of occupancy and exclusivity of ownership, the Attorney General found the modern timeshare to be more like a hotel than a residential use. *Id.* at 140. However, the Attorney General also stated that in approving a specific use the public Agency trustee (e.g., the City of San Diego) would have to assess “how much tideland property would be committed to the timeshare resort relative to adjacent public trust land” in order to properly determine the impairment of public trust lands by the use.

Here, because the vacationers acquire no real property interest in the units and therefore do not own or control individual units, the proposed project is even more like a hotel than the

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<sup>1</sup>The memorandum does not include any information regarding how far in advance vacationers with credits would need to make reservations, or how the proposal might affect the ability of members of the general public to make extended-stay reservations.

timeshare resort analyzed by the Attorney General. With control of the units retained in the City's lessee, rather than multiple individual owners, the City can better ensure that unreserved units are made available to the general public. However, the ability to purchase fifty years of one-week vacations at the hotel in advance limits the availability of rooms to the general public.

Theoretically, if all of the units in the Park were subject to pre-sold reservations and all of the vacationers used their vacation time, there would be no units in the Park available to the general public on a first come, first served basis. To ensure the transient occupancy is retained and that an adequate number of rooms are available to the general public on a first come, first served basis, the City Attorney recommends that an appropriate policy be adopted that ensures: (1) the total number of units with pre-sold reservations within Mission Bay Park is limited to ensure sufficient rooms are still available to the general public on a first come, first served basis; (2) any unused units are made available to the general public on a daily rental basis; and (3) contracts permitting such uses contain audit provisions permitting the City to audit the use and availability of the rooms to ensure consistency with the purported purpose and represented operation of the hotel. If adopted, such a policy will help ensure that the use and operation of such hotels remains consistent with the tidelands trust.

## II.

### **THE PROPOSED USE IS CONSISTENT WITH CHARTER SECTION 55.**

Charter section 55 provides that dedicated park land

shall not be used for any but park [and] recreation . . . purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.

The general rule for permissible park uses has been stated by this Office as follows:

[A] proper park use is one that does not interfere with the enjoyment by the general public of the park for park and recreational purposes and is consistent with and complementary to or enhances such purposes.

1975 Op. City Att'y 139, 140.

Hotel uses have long been upheld by the courts as permissible park uses. *Harter v. San Jose*, 141 Cal. 659 (1904). *See also, Spires v. City of Los Angeles*, 150 Cal. 64, 66 (1906) (recognizing the general approval of hotels as park uses). The City Attorney has previously advised that a hotel is permissible in a dedicated public park where the hotel is reasonably determined to be needed to accommodate the needs of park visitors. 1984 City Att'y MOL 234.

The City has approved leases for a number of hotels on dedicated City parkland, including the Mission Bay Hilton, the Princess Resort, and the Dana Inn. Residential use, on the other hand, is inconsistent with the dedication of parkland for the benefit of the public. *See, e.g., Griffith v. City of Los Angeles*, 78 Cal. App. 2d 796 (1974) (allowing residential use only as a temporary emergency housing measure).

The salient feature of hotel use that makes the use permissible on dedicated parkland is the transient nature of the occupancy. Transient occupancy does not create a real property interest which would include the right to exclude others. It continues to allow the parkland to be available for use by the general public and enhances the general public's use by making transient lodging available for visitors. As explained above, timeshare resorts are typically a hybrid between a hotel and a residential use. These facilities generally permit the "ownership" of units for transient occupancy periods. Such a use would not be consistent with Charter section 55; however, the vacation club concept proposed here does not appear to be inconsistent with that purpose provided that the use of such facilities does not become de facto "ownership" by a relative few.

Toward that end, we recommend that, in addition to the policy recommended above and the general finding that such a hotel is determined to be reasonably necessary to accommodate park visitors, a further policy be adopted which provides that any contract permitting the described use includes specific provisions to ensure that: (1) the occupancy of the units is transient in nature and no property rights are conveyed for individual units; (2) the sale of vacation credits should provide that the credits expire with the ground lease, regardless of the date of termination; and (3) vacation credit sales should be limited to one-week increments.

## CONCLUSION

The project, as proposed, will not be inconsistent with the tidelands trust and Charter section 55 if a hotel use in Mission Bay Park is reasonably determined to be necessary to accommodate Park visitors. In addition, in order to ensure that the proposed use remains consistent with both the tidelands trust and Charter section 55, we recommend that an appropriate policy be adopted which requires: (1) the total number of units with pre-sold reservations within Mission Bay Park be limited to ensure sufficient rooms are still available to the general public on a first come, first served basis; (2) any unused units be made available to the general public on a daily rental basis; (3) contracts permitting such uses contain audit provisions permitting the City to audit the use and availability of the rooms consistent with the purported and intended purpose and operation of the hotel; (4) contracts permitting such uses include specific provisions to ensure the occupancy of the units is transient in nature and no property rights are conveyed for individual units; (5) the sale of vacation credits provides that the credits expire with the ground lease, regardless of the date of termination; and (6) pre-sold reservations are limited to one-week increments. To the extent any of the land proposed for lease

includes tidelands, the use must also comply with the guidelines provided by the Attorney General for tidelands use.

This Memorandum of Law is limited to the facts as represented to us, and is further limited to the provision of the described project within Mission Bay Park. Any application of these principles to different projects or locations other than Mission Bay Park must be specifically analyzed.

CASEY GWINN, City Attorney

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By

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Deputy City Attorney

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Attachment

cc: Marcia McLatchy

ML-2001-4